

January 2008

## Balancing Public School Students' First Amendment Freedoms with the Blackboard Jungle: Are Students in Danger of Becoming Another Brick in the Wall after *Hazelwood*?

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### Recommended Citation

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# **BALANCING PUBLIC SCHOOL STUDENTS' FIRST AMENDMENT FREEDOMS WITH THE BLACKBOARD JUNGLE: ARE STUDENTS IN DANGER OF BECOMING ANOTHER BRICK IN THE WALL AFTER *HAZELWOOD*?**

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## **I. INTRODUCTION**

The legendary philosopher John Locke envisioned a world where every person possesses equal and inalienable rights that are the foundation of democracy and democratic thought. Interestingly enough, Locke was notorious for supporting the ideal that atheistic thought, or any blasphemous thought for that matter, should be restricted upon the basis that it undermines religion and the

importance of God.<sup>1</sup> At first glance, this belief would seem at odds with his philosophy, yet the idea that “dangerous” speech deserves no constitutional protection has plagued conceptions of a democratic society throughout our American history.<sup>2</sup> Why, one must ask, does this problem still persist in our modern society? This Note will attempt to answer this vital question through focusing on the current landscape of public schools and the scope of their abilities to censor student speech. More specifically, this Note explains why public schools should not discriminate based upon viewpoint when dealing with speech or expression unrelated to the school’s educational mission.<sup>3</sup> Schools must be prepared to assert independent reasons for student censorship unrelated to viewpoint if the First Amendment is to have any weight in the public school system.

The government carries the responsibility of preparing a child for her role in society through the public school system. The extent of the educator’s role, however, creates a divide between two schools of thought that is preeminently displayed in the majority opinion and dissent for *Tinker v. Des Moines Independent Community School District*.<sup>4</sup> Writing for the majority of the Court, Justice Fortas emphatically stated that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>5</sup> If the school is responsible for preparing its students for citizenship, free expression requires vigilant protection, for students possess fundamental rights that a school may not circumvent through indoctrination.<sup>6</sup> Essentially, Justice Fortas promotes the view that a school exists as a “marketplace of ideas,” or an avenue for discourse that helps develop the minds of its students and society.<sup>7</sup>

The opposing view stands in stark contrast to the marketplace of ideas concept, arguing that students should be indoctrinated as opposed to engaged in discourse.<sup>8</sup> Justice Black promulgated this view in his dissent, asserting the idea that great deference should be provided to school officials when making decisions over student speech:

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<sup>1</sup> JOHN LOCKE, A LETTER ON TOLERATION 135 (Raymond Klibansky ed., Oxford University Press 1968) (1689).

<sup>2</sup> The Espionage Act of 1917, ch. 30, § 3, 40 stat. 217 (repealed 1921), and the Sedition Act of 1918, ch. 75, § 1, 40 stat. 553 (repealed 1921), both restricted speech critical of the United States war effort to extreme lengths. *See* *Debs v. United States*, 249 U.S. 211, 215 (1919) (convicting Eugene Debs over a speech opposing the war); *Schenk v. United States*, 249 U.S. 47, 51 (1919) (convicting protestors who passed out leaflets criticizing the draft).

<sup>3</sup> The current standard set forth by the Supreme Court allows public schools to censor student expression when the speech is school-sponsored or carries the mark of the school. *See* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-76 (1988).

<sup>4</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). *See generally* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527 (2000).

<sup>5</sup> *Tinker*, 393 U.S. at 506.

<sup>6</sup> *Id.* at 511.

<sup>7</sup> *Id.* at 512 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>8</sup> *Id.* at 522 (Black, J., dissenting).

The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outworn the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.<sup>9</sup>

Therefore, this concept of education would allow school officials to apply viewpoint discrimination, for school decisions over student speech must rest within the school's authoritative role under a low standard of judicial review.<sup>10</sup>

Consider the following hypothetical: A student named Christina attends a public high school in small town West Virginia. She practices atheism as her belief system along with both students and adults. Never afraid to assert her First Amendment rights in any given context, Christina actively participates in local organizations that share her views and she writes for an online journal concerning the lifestyles of teenage atheists. One day in school, her history teacher gives an assignment asking the students to write an essay about what they would do to change the current landscape of American government. Although the teacher does not give any specific instructions about writing the paper, the general consensus is that the students must implement governmental theories learned in class within their respective essays. The best essays will be presented at a school-sponsored function to students and various faculty members.

Christina decides to write about the principles of atheism, arguing that all governmental leaders should disregard organized religion entirely and become atheists. Christina's teacher, not one to deny craftsmanship, gives her a superior grade on the assignment but refuses to allow Christina to speak at the function. When she complains to the school principal about the situation, the principal takes the side of the teacher and agrees that Christina's speech would be inappropriate at this particular function. After explaining the situation to her parents, Christina files suit against the school for violating her freedom of speech by discriminating against her viewpoint without offering an independent reason to support the restriction. The school argues that it did not discriminate based upon Christina's viewpoint, but instead denied her access to the forum because it interfered with the school's legitimate pedagogical concerns.<sup>11</sup> Based upon these facts, who should prevail? Unfortunately, no clear answer is apparent in First Amendment jurisprudence, and a current circuit split exists as to

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 515-26.

<sup>11</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988).

whether public schools may discriminate based upon a viewpoint or whether they must remain viewpoint-neutral at all times when making restrictions.

The First and Tenth Circuits expressly hold that educators may make viewpoint-based decisions about school-sponsored or school-related speech,<sup>12</sup> yet the Second and Ninth Circuits hold that the general requirement of viewpoint neutrality must be upheld even in non-public or designated public forums.<sup>13</sup> The split arose out of modern interpretations of the seminal Supreme Court case *Hazelwood School District v. Kuhlmeier*,<sup>14</sup> which held that public schools may limit student speech when the limitations are reasonably related to legitimate pedagogical concerns.<sup>15</sup> The Court never expressly stated that viewpoint discrimination is a justifiable concept, but jurisdictions such as the First and Tenth Circuits argue that the Court implied within its reasoning that such discrimination is necessary for schools to fulfill their guardian role.<sup>16</sup> After a careful evaluation of all significant First Amendment issues, it is clear that the Ninth and Second Circuit holdings provide the proper solution in concluding that public schools must remain viewpoint neutral when determining whether to restrict a student's speech.

This Note will argue that public schools should adopt the viewpoint-neutral approach when evaluating student speech because of the inalienable rights imbedded within the First Amendment.<sup>17</sup> Part II of this Note will provide the background of student speech in public schools and discuss the scope of public forums and viewpoint discrimination within the public school setting. Part III will analyze the current split over the interpretation of *Hazelwood* through illustrating cases that reject viewpoint discrimination and cases that promote its value in the public school system. Part IV will debate the issue by analyzing the legal reasoning employed by the circuits, ultimately concluding that *Hazelwood* did not give school officials the authority to discriminate based on viewpoint. Part V will offer a more theoretical approach to the matter and attempt to provide school officials with guidelines to properly evaluate their institution's educational role. Finally, Part VI will conclude the Note with an epilogue concerning the Christina hypothetical, championing the marketplace of ideas theory promoted by Justice Fortas that students should not be silenced for expressing legitimate viewpoints.<sup>18</sup>

<sup>12</sup> *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002).

<sup>13</sup> *Peck ex rel. Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991).

<sup>14</sup> *Hazelwood*, 484 U.S. 260.

<sup>15</sup> *Id.* at 272-76.

<sup>16</sup> See discussion *infra* Parts III.B.1-2.

<sup>17</sup> "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

<sup>18</sup> *Id.* at 512.

## II. A BRIEF HISTORY OF STUDENT SPEECH WITHIN PUBLIC SCHOOLS

When evaluating the current scope of authority that schools may exercise when restricting student speech, it is important to understand the evolution of this area of law. Two major Supreme Court cases, *Tinker v. Des Moines Independent Community School District*<sup>19</sup> and *Hazelwood School District v. Kuhlmeier*,<sup>20</sup> provide the foundation for analyzing First Amendment issues arising in public schools. These two cases are solid bookends in the debate between the conflicting freedoms between schools and students, and thus require a thorough evaluation.<sup>21</sup>

### A. *The Liberal Approach: How Tinker Offered Extensive Protection of Student Speech*

The issue in *Tinker* dealt specifically with the extent of student expression in the public school setting. The Court held that school officials may only restrict speech when the expression substantially disrupts the school environment.<sup>22</sup> The facts underlying *Tinker* concerned two high school students and one junior high school student who displayed their objections to the Vietnam War by wearing black armbands throughout December.<sup>23</sup> The principals of the Des Moines schools found out about the planned protest and enacted a policy where “any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.”<sup>24</sup> The students, aware of the policy, persisted in wearing the armbands and were suspended.<sup>25</sup>

The students’ fathers filed suit in the United States District Court for the Southern District of Iowa, which held that the school’s actions were reasonable due to the potential disturbance that the armbands may cause at the school.<sup>26</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>21</sup> On June 25, 2007, the Supreme Court issued its decision for *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the “Bong Hits 4 Jesus” case. The majority opinion, authored by Chief Justice John G. Roberts, held that “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.” *Id.* at 2622. This holding carries no weight with respect to viewpoint discrimination, for it merely creates an independent and narrow rule that restricts student expression linked to drug use. Therefore, for the purposes of this Note, *Morse* will not be discussed because it does not coordinate with religious or political student speech.

<sup>22</sup> *Tinker*, 393 U.S. at 513.

<sup>23</sup> *Id.* at 504.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 504-05.

The court rejected the substantial disruption test of *Burnside v. Byars*<sup>27</sup> and instead deferred to the decision of the schools. *Tinker* was affirmed by the Court of Appeals with no opinion.<sup>28</sup> After granting certiorari, the Supreme Court, insistent that students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,”<sup>29</sup> reversed the lower court’s holding, and held that the wearing of the black armbands was entitled to full constitutional protection.<sup>30</sup>

Throughout its decision, the Court focused on the ultimate importance of the freedoms of expression and speech preserved in the First Amendment. It rejected the District Court’s argument that the school authorities acted reasonably because “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”<sup>31</sup> By adopting the substantial disruption test in *Byars*,<sup>32</sup> the Court took a firm stance against absolute regulatory authority for school officials.<sup>33</sup> If anything, the Court reasoned that the students’ display of the armbands would facilitate debate and intercourse, thus the school would be strengthened through its designated role as a particular “marketplace of ideas.”<sup>34</sup>

The holding in *Tinker* is relevant to the present discussion because the Court took an aggressive stance against viewpoint discrimination in public schools.<sup>35</sup> In response to the fact that the school permitted the portrayal of Nazi and Iron Cross symbols, the Court stated that the prohibition of one particular opinion is not constitutional without evidence of valid reasons for regulation.<sup>36</sup> This early opinion against viewpoint discrimination in public schools implies that public schools may not utilize this type of discrimination in any manner. *Tinker*, however, dealt specifically with student speech that happened to occur on school property, not student speech directly tied to the school or speech that carries the school’s imprimatur or mark.

Once adopted by the circuit courts, the *Tinker* standard was interpreted to mean that officials could restrict potentially disrupting speech where there

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<sup>27</sup> *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966) (holding that students should be allowed to display freedom buttons “where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school”).

<sup>28</sup> *Tinker*, 393 U.S. at 505.

<sup>29</sup> *Id.* at 506.

<sup>30</sup> *Id.* at 514.

<sup>31</sup> *Id.* at 508.

<sup>32</sup> *Byars*, 363 F.2d at 749.

<sup>33</sup> *Tinker*, 393 U.S. at 509.

<sup>34</sup> *Id.* at 512 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>35</sup> *Id.* at 510-11.

<sup>36</sup> *Id.* at 511.

was rational basis for the restriction.<sup>37</sup> This interpretation, however, dealt specifically with potentially disrupting speech and did not provide school officials great deference when restricting student speech focused on ideological viewpoints.

The Court attempted and failed to clarify the issue of viewpoint discrimination in *Hazelwood*, creating the split among the circuits about a school's ability to regulate student speech by employing viewpoint discrimination when the speech carries the imprimatur of the school.<sup>38</sup>

#### *B. The Deferential Approach: How Hazelwood Gave Power Back to the Schools*

The *Hazelwood* decision revolved around the question as to whether a school may restrict a student's speech when the speech is inherently attached to the school.<sup>39</sup> The student newspaper, *Spectrum*, was written and edited by students taking the Journalism II class under supervision of a faculty advisor.<sup>40</sup> The journalism teacher subsequently submitted the materials to the principal, for review and approval.<sup>41</sup> Upon one of these reviews, the principal decided not to publish an article detailing the lives of pregnant teenagers at Hazelwood East.<sup>42</sup> Because there was no time to make changes to the article, he eliminated the two pages where the alleged offensive materials occurred.<sup>43</sup>

Upon hearing the students' belief that their First Amendment rights had been violated, the matter was taken to court. The District Court held that school officials may impose regulations on student speech that is linked to an "integral part" of the school's education purpose so long as the regulations are reasonable.<sup>44</sup> It concluded that the principal had a reasonable basis for not publishing

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<sup>37</sup> Compare *Williams v. Spencer*, 622 F.2d 1200, 1206 (4th Cir. 1980) (commenting on the restriction of speech in a student newspaper to prevent a potential disruption: "Such disruption, however, is merely one justification for school authorities to restrain the distribution of a publication; nowhere has it been held to be the sole justification."), with *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 974 (5th Cir. 1972) ("[T]here must be demonstrable factors that would give rise to any reasonable forecast . . . [of] disruption of school activities before expression may be constitutionally restrained. . . . such paramount freedoms as speech and expression cannot be stifled on the sole ground of intuition."), and *Frasca v. Andrews*, 463 F. Supp. 1043, 1051 (E.D.N.Y. 1979) (holding that principal Robert Andrews acted reasonably by restricting a school publication that contained a threatening letter from the lacrosse team: "[T]he court is satisfied that defendant Andrews had a rational basis grounded in fact for his conclusion that publication would create a substantial risk of disruption of school activities.").

<sup>38</sup> See discussion *infra* Parts III.A-B.

<sup>39</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

<sup>40</sup> *Id.* at 262-63.

<sup>41</sup> *Id.* at 263.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 264.

<sup>44</sup> *Id.* (quoting *Frasca v. Andrews*, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979)).



the article, mostly due to the fact that the anonymous teens in the article were easily identifiable.<sup>45</sup> On appeal, the Eighth Circuit reversed, concluding that a school newspaper was a public forum and thus school officials were precluded from censoring content.<sup>46</sup>

The Eighth Circuit applied *Tinker* and held that the school officials may censor when “necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.”<sup>47</sup> On certiorari, the Supreme Court confronted two major issues: whether school officials may restrict student speech in a medium such as a school newspaper and, more importantly, whether *Tinker* controls with respect to school-sponsored student speech. The Court held, in equal parts, that *Tinker* does not extend to school-sponsored mediums and that school officials may exercise control over “student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns.”<sup>48</sup>

After concluding that the school newspaper was not a designated public forum,<sup>49</sup> the Court evaluated the issue within the context of *Tinker*.<sup>50</sup> It concluded that a significant difference exists between “a student’s personal expression that happens to occur on school” property and expression that is facilitated through a school-sponsored medium or “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”<sup>51</sup> Resting its conclusion on the idea that a school possesses authority over school-sponsored or school-related mediums, the Court held that *Tinker* should not control the entire area of First Amendment rights in the public school system.<sup>52</sup> The importance of the school’s paternalistic authority over its students, coupled with its role as an educator, justifies its ability to regulate speech where its decision is “reasonably related to legitimate pedagogical concerns.”<sup>53</sup>

The *Hazelwood* Court ultimately decided that the principal acted reasonably by refusing to publish the offensive articles, and thus set forth the current standard applied by courts in the nation’s public school systems.<sup>54</sup> Although the Court relied upon the importance of the school’s purpose to educate and shape youth, it did not fully address the scope of the school’s authority to

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 265.

<sup>47</sup> *Id.* (citing *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 511 (1969)).

<sup>48</sup> *Id.* at 273.

<sup>49</sup> See discussion *infra* Part II.C.

<sup>50</sup> *Hazelwood*, 484 U.S. at 270-71.

<sup>51</sup> *Id.* at 271.

<sup>52</sup> *Id.* at 271-72.

<sup>53</sup> *Id.* at 273.

<sup>54</sup> *Id.* at 274-75.

regulate student expression.<sup>55</sup> Would the subjective opinions of the school officials weigh heavily on the decision as to what they decide are legitimate pedagogical concerns? Also, what criteria may a school use when deciding whether to restrict certain areas of speech?

Justice Brennan recognized these concerns in his dissent, arguing that *Tinker* created an objective and clear rule that should control this area of First Amendment law,<sup>56</sup> but the majority found it necessary to grant public schools more authority. There is no question, however, that this grant of power also created an opportunity for schools to abuse this power.

The potential for this abuse forms the essence of this Note. If schools possess extensive authority in this context, students may as well shed their constitutional rights whenever they get involved with school-sponsored events or mediums. The idea that schools may apply viewpoint discrimination when evaluating student speech destroys chances for neutrality on the issue of free speech, for schools may widen the scope of what constitutes a legitimate pedagogical concern to unfair extremes. For example, if a school could simply restrict Christina's article because of her atheism, it would be discriminating against her controversial viewpoint. Shouldn't the school be required to give valid independent reasons for the restriction as opposed to pre-judging her speech? The opportunity for reasonable discourse cannot be overstated, so Christina should have the privilege of arguing with the school officials over the content of her essay.

Some circuits hold that *Hazelwood* opened the door to this type of paternalistic authority over the students, yet the *Hazelwood* Court never took a stance on the issue of viewpoint discrimination. In contrast to this interpretation, the Court seemed to disagree with the idea of extensively broad school authority. "It is only when the decision to censor . . . has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' as to require judicial intervention to protect students' constitutional rights."<sup>57</sup> One may argue that the ability of a school to censor speech based on viewpoint discrimination dilutes the necessity of an educational purpose. An educational purpose could be attributed to restrictions necessary "to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."<sup>58</sup>

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<sup>55</sup> *Id.* at 272.

<sup>56</sup> "In *Tinker*, this Court struck the balance. . . . The 'mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint' . . . does not justify official suppression of student speech in the high school." *Id.* at 280-81 (Brennan, J., dissenting) (internal citations removed).

<sup>57</sup> *Id.* at 273 (majority opinion) (alteration in original) (internal reference removed).

<sup>58</sup> *Id.* at 271.

In terms of the Christina hypothetical, if the public school justified its educational purpose through basic disagreement with her viewpoint, the idea that a public school exists as a marketplace of ideas is quickly lost. Under the criteria listed in *Hazelwood* for what constitutes an educational purpose, Christina's essay cannot be faulted. She followed the instructions of the assignment, wrote about a topic that is in no way vulgar or inappropriate for a younger audience, and most would perceive her essay to be attributed to her and her alone. These considerations will be discussed more thoroughly later in this Note.

Because this area of constitutional law incorporates multi-layered legal issues, the next section will provide a brief history on forum evaluations concerning public schools and how the Supreme Court views viewpoint discrimination.

### C. *Forum Evaluation*

Under the First Amendment, claims involving freedom of speech or expression sometimes depend upon the forum where the speech or expression occurs. Three types of forums are generally recognized: traditional public forums, such as parks and sidewalks; designated forums, such as such as classrooms that are allowed for community use in the evenings; and non-public forums, such as restricted bulletin boards or property aligned with a highway.<sup>59</sup> Public schools are not considered traditional public forums, but certain mediums, such as a student newspaper, may fall under the designated forum connotation.<sup>60</sup>

Designated public forums are those forums that the government has voluntarily opened for use by the public or certain speakers for expressive activity.<sup>61</sup> Speech that occurs in these forums is protected on equal status with traditional public forums, such as public parks and sidewalks, so long as the forum remains open.<sup>62</sup> In this sense, a student newspaper could be construed as a designated forum if the school voluntarily opened up the paper to students, a certain class of people, and allowed the free exercise of opinion. In actuality, most courts have adopted the *Hazelwood* analysis and concluded that school-sponsored mediums are primarily nonpublic forums.<sup>63</sup>

Courts employ an intent evaluation by examining various factors relevant to the forum when deciding whether a governmental entity has opened up a

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<sup>59</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802-806 (1985). See generally Derek P. Langhauser, *Drawing the Line Between Free and Regulated Speech on Public College Campuses: Key Steps and the Forum Analysis*, 181 EDUC. L.R. 339 (2003).

<sup>60</sup> *Dean v. Utica Cmty. Schs.*, 345 F. Supp 2d 799, 806-09 (E.D. Mich. 2004) (concluding, after providing a substantial forum evaluation, that the school's paper was a designated forum).

<sup>61</sup> *Cornelius*, 473 U.S. at 802.

<sup>62</sup> *Id.* at 802-03.

<sup>63</sup> *Bannon v. Sch. Dist.*, 387 F.3d 1208 (11th Cir. 2004).

forum to a designated class of people for expressive activity.<sup>64</sup> Some of the general factors consist of the policy and practices of the government, the nature of the property or medium and its compatibility with expressive activity, and consistency in granting or refusing access to the forum.<sup>65</sup> The *Hazelwood* Court used this analysis to decide whether a student newspaper constitutes a designated forum, ultimately holding that the newspaper was a closed forum and thus the school may regulate it when driven by reasonable pedagogical concerns.<sup>66</sup> The Court looked at intent factors such as whether the students produced the newspaper as part of the curriculum, whether the students received class credits for its publication, whether a faculty member oversaw the production and reviewed the material, and whether the school employed practices of regulation and censorship consistently.<sup>67</sup> In the end, it held that the newspaper was not a limited forum because the school established a clear intent to regulate it under school curricula standards, and thus the school could disassociate itself from certain material when it conflicted with educational goals.<sup>68</sup> It should be noted, however, that some jurisdictions have evaluated school newspapers under similar standards and concluded that these papers should be held as limited forums.<sup>69</sup>

The historical purpose of the forum evaluation is critical. Nonpublic forums, although restricted, do not allow the governmental entity to discriminate on viewpoint: the government may impose content based restrictions when they are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>70</sup> Whether or not a school-sponsored medium such as a newspaper could be designated as a limited public forum does not have tremendous bearing on this Note.<sup>71</sup> For example, the Christina hypothetical concerns a school assignment, so there is no question that it possesses direct ties to the school's curriculum. Even if the teacher has routinely allowed her students to write about any topic or subject for this assignment, there is little chance that courts would recognize it as a limited forum. Therefore, Christina should be safe from viewpoint discrimination, no matter the nature of the forum, if she relies upon Supreme Court precedent.<sup>72</sup>

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<sup>64</sup> *Cornelius*, 473 U.S. at 802-04.

<sup>65</sup> *Id.* at 802-04.

<sup>66</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

<sup>67</sup> *Id.* at 267-71.

<sup>68</sup> *Id.* at 270.

<sup>69</sup> *See supra* note 63.

<sup>70</sup> *Cornelius*, 473 U.S. at 800 (alteration in original).

<sup>71</sup> For an alternative view on student speech from a forum perspective, see James C. Dever III, *Tinker Revisited: Fraser v. Bethel School District and Regulation of Speech in the Public Schools*, 1985 DUKE L.J. 1164, 1175-77 (1985).

<sup>72</sup> *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (commenting on nonpublic forums: "The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.").

### III. OUTLINING THE CURRENT CIRCUIT SPLIT OVER VIEWPOINT DISCRIMINATION

The preceding section illustrates how the Supreme Court has shaped First Amendment exceptions with respect to both school-sponsored and student speech.<sup>73</sup> Currently, jurisdictions throughout the country have reached varying conclusions concerning the degree of school authority that *Hazelwood* instituted with its standard. The distinction between the Second and Ninth Circuits, arguing for viewpoint neutrality, and the First and Tenth Circuits, arguing for the allowance of viewpoint discrimination, creates a significant divide in First Amendment protection for students.<sup>74</sup>

The argument for public schools to remain viewpoint neutral when restricting speech is well-founded in the cases *Planned Parenthood v. Clark County School District*<sup>75</sup> and *Peck v. Baldwinsville Central School District*.<sup>76</sup> This Note will argue that *Peck* provides the proper rationale in determining that viewpoint discrimination is *prima facie* unconstitutional.<sup>77</sup>

#### A. *Federal Court Decisions Rejecting an Adoption of Viewpoint Discrimination*

##### 1. *Planned Parenthood v. Clark Co. School District*

*Planned Parenthood*, decided shortly after the *Hazelwood* decision, involved a family planning program that claimed its First Amendment rights were violated when the Clark County School District refused to accept its advertisements in high school newspapers, yearbooks, and athletic programs.<sup>78</sup> The school district had adopted a policy that allowed the schools within the district to deny advertising that did not serve the best interests of the school, and birth control was a subject deemed regulatory because of its controversial nature.<sup>79</sup> The court ultimately decided that the school was allowed to refuse advertising from *Planned Parenthood*, holding that a school may “retain the authority to refuse to sponsor speech that might reasonably ‘associate the school with any position other than neutrality on matters of political controversy.’”<sup>80</sup> The court found it highly likely that members of the public would reasonably perceive

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<sup>73</sup> See discussion *supra* Part II.B

<sup>74</sup> See *infra* Parts III.A-B.

<sup>75</sup> *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991).

<sup>76</sup> *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617 (2d Cir. 2005).

<sup>77</sup> *Id.* at 633.

<sup>78</sup> *Planned Parenthood*, 941 F.2d at 820-21.

<sup>79</sup> *Id.* at 821.

<sup>80</sup> *Id.* at 828 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988)).

school-sponsored publications to “bear the imprimatur of the school” and thus associate the advertisements with the school.<sup>81</sup> Although this case restricts speech, the court employed the viewpoint neutral test when deciding whether the restriction was justified:

The school’s refusal to publish Planned Parenthood’s advertisements was viewpoint neutral. Planned Parenthood’s advertisements were rejected . . . in order to maintain a position of neutrality on the sensitive and controversial issue of family planning and avoid being forced to open up their publications for advertisements on both sides of the ‘pro-life’ – ‘pro-choice’ debate.<sup>82</sup>

In essence, the *Planned Parenthood* court focused on the nonpublic nature of the school-sponsored publications, resting its conclusion on ideals raised in *Cornelius v. NAACP Legal Defense & Education Fund*: “Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas.”<sup>83</sup> Therefore, avoidance of controversy is a sufficient interest of the school if enacted reasonably and without viewpoint discrimination, for the school has a valid educational purpose in disassociating itself from speech that could be erroneously attributed to the school.

## 2. *Peck v. Baldwinsville Central School District*

This same analysis was used in the recent Second Circuit case *Peck v. Baldwinsville Central School District*, where the Court held that viewpoint discrimination is *prima facie* unconstitutional even if reasonably related to pedagogical concerns.<sup>84</sup> The *Peck* decision offers a significant foundation for future cases concerning the extent of school regulation on speech, and this Note argues that it correctly and sufficiently decides the issue at hand.

The First Amendment issue arose in *Peck* when a kindergarten student created a poster that contained Jesus Christ for his environmental science assignment.<sup>85</sup> The assignment instructed students to depict ways to save the environment, such as pictures of recycling or disposing of trash, in a poster that would subsequently be posted in the school cafeteria. Initially, the student turned in an overtly religious poster that possessed no reference to the environ-

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<sup>81</sup> *Id.* at 828-29.

<sup>82</sup> *Id.* at 829.

<sup>83</sup> *Id.* at 829 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)).

<sup>84</sup> *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617,633 (2d Cir. 2005).

<sup>85</sup> *Id.* at 622.

ment, and the teacher informed the student's mother he should create a new poster because the current one did not demonstrate his learning of the environmental lessons.<sup>86</sup> The second poster, although containing depictions of the environment, still contained religious imagery such as a robed figure and a church. The principal of the school decided that the robed figure should be blocked out once it was posted in the cafeteria, but a large portion of the church was also blocked out due to a mistake by a parent volunteer.<sup>87</sup> Thus, the student and his parents brought action under the First Amendment, arguing that the school officials did not remain viewpoint neutral when restricting the student's poster.<sup>88</sup>

The first question raised in this case concerned whether *Tinker* or *Hazelwood* should control, and the family argued that the more speech-protective *Tinker* should control the case, thus forcing a higher burden of proof upon the school for restricting the poster.<sup>89</sup> In resolving this issue, the court first provided a forum analysis, and concluded that the school cafeteria constituted a nonpublic area.<sup>90</sup> Because the school never displayed any inclination to open up its cafeteria or facilities to private organizations, it was justified in regulating the poster in a reasonable manner under the nonpublic forum standard.<sup>91</sup> The court proceeded to conclude that *Hazelwood* should control, for although *Tinker* offers a more speech-protective standard, the poster assignment and assembly were school-sponsored events and thus fell within the framework set forth in *Hazelwood*.<sup>92</sup> The family attempted to argue that the poster was no different from the armbands worn in *Tinker*, but this argument was unpersuasive due to the deferential policy instituted by *Hazelwood* coupled with the fact that the poster assembly carried the imprimatur of the school.<sup>93</sup> Currently, conflict still exists over what situations trigger the *Tinker* or *Hazelwood* standard.

The *Peck* court proceeded to discuss the importance of remaining viewpoint neutral when restricting speech under *Hazelwood*, thereby setting forth the vital policies behind its decision. Following the *Hazelwood* standard, the school asserted that its legitimate pedagogical concerns in restricting the poster were that the robed figure was not responsive to the assignment, that the image was not the student's own work, and that the display of the image at the assembly may lead others to believe that the environmental unit included the teaching of religion, thus raising Establishment Clause issues.<sup>94</sup> Because the *Hazelwood* standard "does not require that the guidelines be the *most* reasonable or the *only*

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 622-23.

<sup>88</sup> *Id.* at 625.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 627.

<sup>91</sup> *Id.* at 627-29.

<sup>92</sup> *Id.* at 628-29.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 629-31.

reasonable limitations, only that they be reasonable,”<sup>95</sup> these concerns passed constitutional muster. The question of viewpoint discrimination, however, remained as to whether the school censored the poster because it was unresponsive to the assignment or because of the religious perspective offered.<sup>96</sup> If the school censored the poster because it was unresponsive to the assignment, the action would be justified because it relates to legitimate pedagogical concern or purpose in ensuring that students learn from their assignments. The school argued that *Hazelwood* permits schools to discriminate on the basis of viewpoint, but that the discrimination must still fall under the reasonableness standard.<sup>97</sup> The court, however, thought otherwise, concluding that *Hazelwood* does not depart from the long-standing requirement of viewpoint neutrality.<sup>98</sup>

The court rested its conclusion on two grounds: (1) the school in the *Hazelwood* decision conceded that only viewpoint neutral restrictions were allowable, so the Court was silent on the issue of viewpoint discrimination and (2) the forum evaluation set forth in *Hazelwood* relied upon Supreme Court precedent that expressly rejected the allowance of viewpoint discrimination.<sup>99</sup> In addressing these concerns, the *Peck* court stated:

Yet *Hazelwood* never distinguished the powerful holdings of these cases with respect to viewpoint neutrality, or, for that matter, even *mentioned*, explicitly, the question of viewpoint neutrality. And we are reluctant to conclude that the Supreme Court would, without discussion and indeed totally *sub silentio*, overrule *Cornelius* and *Perry* – even in the limited context of school-sponsored speech.<sup>100</sup>

Therefore, the court remanded the case so that further fact-finding may be developed to resolve whether the school demonstrated viewpoint discrimination in censoring the poster.<sup>101</sup>

The *Peck* decision represents the correct interpretation of the *Hazelwood* because it recognizes the importance of Supreme Court precedent and First Amendment freedoms. The Christina hypothetical mirrors *Peck* because both involve students exercising their freedom of speech within the framework of school assignments. Therefore, the school may argue that the controversial nature of Christina’s topic raises a legitimate pedagogical concern, thus proffer-

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<sup>95</sup> *Id.* at 630 (citing *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 932 (10th Cir. 2002)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 631.

<sup>98</sup> *Id.* at 633.

<sup>99</sup> *Id.* at 632-33.

<sup>100</sup> *Id.* at 633.

<sup>101</sup> *Id.* at 635.



ing the argument set forth in the *Planned Parenthood* case.<sup>102</sup> The school could not, however, argue that Christina was unresponsive to the assignment, for its guidelines allowed complete freedom in formulating a thesis. Therefore, the free nature of the essay presupposed the idea that the educational purpose of the assignment was to foster creativity. Other valid concerns will be raised later, but it seems as if the controversy argument would represent the school's most valid justification for censorship. Christina, however, could easily counter that the controversy argument is tied to viewpoint discrimination, citing Supreme Court precedent to combat the ideology of the school.<sup>103</sup> The issue becomes much more complicated, however, once the school asserts that its role as a special institution compels viewpoint-based decisions.<sup>104</sup>

*B. Federal Court Decisions Holding that Viewpoint Discrimination is a Necessary Tool for Public School Officials*

The First and Tenth Circuits expressly hold that *Hazelwood* granted school officials the authority to utilize viewpoint discrimination when making pedagogical decisions. Although *Hazelwood* is silent on the issue, these jurisdictions argue that this deferential approach is implicit within the Supreme Court's reasoning. Both *Ward v. Hickey*<sup>105</sup> and *Fleming v. Jefferson County School District*<sup>106</sup> rely on the principle that the school represents a unique environment and thus requires a great deal of deference in its decision-making so that it may function properly. Essentially, these two circuits broadly interpret *Hazelwood* to give more authority to the public school system, holding that viewpoint discrimination is a necessary tool for school officials to utilize in making the proper decisions about its pedagogical goals.

*1. Ward v. Hickey*

The dispute in *Ward* concerned a ninth grade biology teacher's discussion of the abortion of fetuses plagued with Down's Syndrome.<sup>107</sup> Upon her denial of reappointment for the next school year, she brought action against the

<sup>102</sup> *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 828-29 (9th Cir. 1991).

<sup>103</sup> *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.").

<sup>104</sup> *See Bruce C. Hafen, Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 699-705 (1988).

<sup>105</sup> *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993).

<sup>106</sup> *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002).

<sup>107</sup> *Ward*, 996 F.2d at 450.

School Committee of the Town of Belmont alleging a violation of her First Amendment right to discuss controversial issues in class.<sup>108</sup> In deciding this case, the court began by analogizing the forum issue alongside *Hazelwood*, and concluded that a teacher's statements in the classroom constitute a school-sponsored forum and, therefore, are subject to reasonable limitations.<sup>109</sup> The court proceeded to discuss and distinguish *Perry Education Association v. Perry Local Educator's Association*<sup>110</sup> which held that a school "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>111</sup> To separate itself from this holding, the *Ward* court held that *Perry* is inapplicable to school curricula speech: "A faculty mailing system significantly differs from a school-sponsored curriculum being taught to a captive audience of youngsters."<sup>112</sup>

The court also advances the "silent" argument, or the idea that *Hazelwood* allows viewpoint discrimination because it did not expressly reject the concept.<sup>113</sup> This line of reasoning was also adopted in *Fleming v. Jefferson County School District*, ultimately concluding that the nature of the *Hazelwood* opinion implicitly grants school officials the necessary and authoritarian discretion to control student speech.

## 2. *Fleming v. Jefferson County School District*

The *Fleming* decision focused on the importance for schools to carry a broad scope of authority when dealing with controversial matters.<sup>114</sup> The issue arose out of a school-sponsored tile project to commemorate the victims of a school shooting.<sup>115</sup> The school allowed parents to help with the project, but set stringent guidelines on the permissible content of the tiles.<sup>116</sup> Certain parents brought action against the school claiming that their children's First Amend-

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<sup>108</sup> *Id.* at 450-51.

<sup>109</sup> *Id.* at 453.

<sup>110</sup> *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983).

<sup>111</sup> *Id.* at 46 (quoting *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 131 (1981)).

<sup>112</sup> *Ward*, 996 F.2d at 454; *see also* *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-86 (1986) (holding that a school may "disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education").

<sup>113</sup> "Indeed, while citing *Perry Educ. Ass'n*, the Court in *Kuhlmeier* did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward*, 996 F.2d at 454 (internal citation omitted).

<sup>114</sup> *See generally* *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 920 (10th Cir. 2002).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 921.

ment rights were violated when the school disallowed the display of religious symbols or the date of the shooting on the tiles.<sup>117</sup>

After holding that *Hazelwood* allows educators to exercise reasonable control over school-sponsored speech, such as the tile project, it concluded that *Hazelwood* also allows school officials to employ viewpoint-based discrimination.<sup>118</sup> The court proceeded to make this presumptive conclusion:

In light of the Court's emphasis on the "special characteristics of the school environment" . . . and the deference to be accorded to school administrators about pedagogical interests, it would make no sense to assume that *Hazelwood* did nothing more than simply repeat the traditional nonpublic forum analysis in school cases.<sup>119</sup>

The *Fleming* court proceeded to provide a detailed analysis of the importance for the allowance of viewpoint discrimination in the public school system. These arguments will be evaluated in the next section of this Note alongside the arguments against viewpoint discrimination, for both sides require an extensive illustration due to the loaded constitutional question at hand.

#### IV. THE MARKETPLACE OF IDEAS MUST REMAIN OPEN TO STUDENTS IN THE PUBLIC SCHOOLS: WHY REASONABLE DISCOURSE WILL ALWAYS OUTWEIGH VIEWPOINT DISCRIMINATION

The main argument formulated by circuits supporting viewpoint discrimination with respect to school-sponsored speech rests on the idea that the school is a unique environment, one that necessarily requires a broad sweep of discretionary authority. These arguments may be formulated either by referring to the school as the speaker<sup>120</sup> or through policy concerns,<sup>121</sup> each carrying significant weight.

The school-as-speaker argument focuses on the idea that the government may regulate its own speech because it is in control of expressing a particular stance.<sup>122</sup> The policy-driven argument, that the school represents a unique atmosphere, possesses much more strength, for one may argue that

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<sup>117</sup> *Id.* at 922.

<sup>118</sup> *Id.* at 926.

<sup>119</sup> *Id.*

<sup>120</sup> *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 173 (3d Cir.1999), *aff'd en banc*, 226 F.3d 198 (3d Cir. 2000).

<sup>121</sup> *See generally Fleming*, 298 F.3d at 918.

<sup>122</sup> *See generally Nat'l Endowment for the Arts v. Finlay* 524 U.S. 569 (1998); *Rust v. Sullivan*, 500 U.S. 173 (1991).

school officials need broad discretion in avoiding unnecessary controversy to properly run their schools.<sup>123</sup> In the end, however, the public interest of student freedoms in the public school setting outweigh the paternalistic philosophy that school officials may employ reasonable viewpoint discrimination with no restrictions.<sup>124</sup>

The school-as-speaker argument focuses on the idea that the State may make content-based choices when it assumes the role of the speaker.<sup>125</sup> Because the State functions as its own speaker “it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted.”<sup>126</sup> Therefore, if the public school assumes the role of the speaker, it may make content-based decisions to effectively convey its pedagogical message:

We conclude that when a public high school is the speaker, its control of its own speech is not subject to the constraints of constitutional safeguards and forum analysis, but instead is measured by practical considerations applicable to any individual’s choice of how to convey oneself: among other things, content, timing, and purpose.<sup>127</sup>

The case *C.H. v. Oliva* takes this idea one step further, holding that where the school assumes the role of the speaker, which is likely to occur whenever a school-sponsored event takes place or where an activity carries the imprimatur of the school, it may censor student speech when the speech is “promoted” by the institution.<sup>128</sup> It distinguishes *Rosenberger v. Rector & Visitors of the University of Virginia*, which held that viewpoint discrimination is inappropriate where the State facilitates private speech through extracurricular activities, by arguing that school-funded extracurricular speech does not carry the voice of the school.<sup>129</sup> This distinction hinges on the idea that school speech carrying the mark of the institution may “occur in a traditional classroom setting, . . . supervised by faculty members and designed to impart particular knowledge or skills to students . . .”<sup>130</sup> or speech linked to the school’s curriculum and pedagogical concerns.

In applying this argument to the Christina hypothetical, one must carefully evaluate the language found in *Rosenberger* and *Hazelwood*. Allowing the

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<sup>123</sup> *Fleming*, 298 F.3d at 928.

<sup>124</sup> *Peck ex rel. Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2nd Cir. 2005).

<sup>125</sup> *Rust*, 500 U.S. at 193.

<sup>126</sup> *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

<sup>127</sup> *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000).

<sup>128</sup> *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 173 (3rd Cir. 1999), *aff’d en banc*, 226 F.3d 198 (3rd Cir. 2000).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

school to determine “the content of the education it provides”<sup>131</sup> is far different from allowing the school to censor a student’s private speech for a school assignment, for the latter situation represents discrimination upon a viewpoint. Christina was responding to an essay that allowed for complete freedom in its production, so the classroom, acting as the voice of the school, essentially facilitated a diversity of viewpoints. It would seem quite unreasonable for the school to subsequently step in and tell Christina that her assignment was not truly free from restrictions because the school disagrees with the viewpoint of atheism. Also, it would be difficult for anyone to believe that Christina assumes the role of a school “agent” when delivering the content of her essay. Most arguments for the allowance of unrestricted government speech occur where the school board or governmental agency speaks, not where a student expresses herself independently of the school board’s ideology.<sup>132</sup> In this case, it would be difficult to show that Christina is promoting the school’s viewpoints through exercising her private speech in an essay. Similar to *Rosenberger*, the school would be *tolerating* her viewpoint because the nature of the essay was to facilitate a diversity of thought and critical thinking, and this aim represents the educational purpose or legitimate pedagogical concern.<sup>133</sup>

The school-as-speaker argument, that a significant difference exists between extracurricular and curricular speech, should not determine whether a school may exercise viewpoint discrimination. School assignments and student publications both carry educational value in the public high school setting, for both areas provide students with academic credit. One cannot in good faith assume that sections written by students naturally carry an endorsement by the public school. Creative expression in academic endeavors is a vital freedom that students possess, but this freedom is abridged if schools would be allowed to reject expression on the basis of viewpoint with no independent reason.

The best argument for the allowance of viewpoint discrimination falls under the policy concern that public schools should naturally be in control of what is expressed in their hallways: “A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order’ or to associate the school with any position other than neutrality on matters of political controversy.”<sup>134</sup> *Fleming* relied on this language to conclude that viewpoint discrimination is necessary to properly control the messages expressed in the school environment. This provides a better framework for schools supporting viewpoint discrimination, for the state-as-speaker argument does not have much force due to the reality that most people do not consider students as agents of the schools.

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<sup>131</sup> *Rosenberger*, 515 U.S. at 833.

<sup>132</sup> *Downs*, 228 F.3d at 1012-13.

<sup>133</sup> *Rosenberger*, 515 U.S. at 833.

<sup>134</sup> *Hazelwood*, 484 U.S. at 272 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986)).

Although this argument of deference seems logical, the potential for abuse naturally accrues with this constitutionally-shielded power. Student speech that advocates use of drugs or alcohol definitely carries no educational weight, but a sufficient number of independent reasons exist that would allow schools to avoid viewpoint discrimination entirely. *Fleming* misconstrues the concept of viewpoint discrimination when discussing language that promotes drugs or vulgarity: "No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. *Hazelwood* entrusts to educators these decisions that require judgments based on viewpoint."<sup>135</sup>

In this situation, however, the schools would merely be making content discriminations expressly allowed in *Bethel School District v. Fraser*.<sup>136</sup> One need only look to the language employed by Chief Justice Burger in his opinion:

Unlike . . . *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.<sup>137</sup>

A significant difference exists between speech that adds to civilized discourse and speech that by its nature conflicts with the educational missions of public schools. In this instance, the school may simply argue that the exposure to vulgar language in the absence of supervision would place students into a coercive environment, therefore justifying the restriction under captive audience theories.<sup>138</sup> Although *Fleming* argues that *Hazelwood* naturally provides the tool of viewpoint discrimination, it only expressly allows them to "retain the authority" to make reasonable decisions related to pedagogical concerns.<sup>139</sup>

The major issue in the constitutionality of viewpoint discrimination, however, concerns the ability of schools to censor controversial viewpoints. The censoring of Christina's essay would stifle her fundamental liberty of free speech, especially if based upon her viewpoint. Reasonable alternatives such as providing a disclaimer for the school to disassociate itself from her message or asserting other independent reasons represent narrowly tailored means that both respect the school's authority while protecting a student's rights.<sup>140</sup> Justice

<sup>135</sup> *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 928 (10th Cir. 2005).

<sup>136</sup> *Fraser*, 478 U.S. at 683.

<sup>137</sup> *Id.* at 685.

<sup>138</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). This argument focuses on the fact that alleged objectionable material cannot be regulated in certain situations, and therefore unwilling parties are coerced into the exposure of the objectionable speech as a captive audience. *Id.* at 748-49.

<sup>139</sup> *Hazelwood*, 484 U.S. at 272.

<sup>140</sup> *Id.* at 289.

Brennan argued that allowing reasonable regulations of potentially controversial material constitutes a “vaporous nonstandard”<sup>141</sup> and acknowledges how the *Hazelwood* opinion “aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the ‘mere’ protection of students from sensitive topics.”<sup>142</sup> The protective argument, of course, opens the door to viewpoint discrimination, but it, at the very least, requires the school to assert a reasonable justification for its censorship.

Although the *Planned Parenthood* case held that the avoidance of controversy justifies a reasonable regulation,<sup>143</sup> Christina may find solace in the fact that her essay in no way may be associated with the school. A school yearbook accepting advertisements is far different from a student writing a non-restrictive essay, for the reasonable observer could quickly associate advertisements for birth control with the school but would not be as quick to associate a student’s essay with the policy of the school board.<sup>144</sup> To avoid the “Orwellian guardianship of the public mind,”<sup>145</sup> a school must encourage freedom of thought and expression. Allowing viewpoint discrimination completely disregards years of Supreme Court precedent that expressly condemns the practice, while creating a dim-lit environment where students may as well shed their constitutional rights at the door.

#### V. HOW PUBLIC SCHOOLS SHOULD VIEW THE ISSUE: STRIKING A BALANCE BETWEEN STUDENTS AND THE SCHOOL SYSTEM’S EDUCATIONAL MISSION

In the grand scheme of things, the issue of student speech in the public school system presents a battle between the government and individual freedoms. Within this spectrum rests the role of educators and children, and this divide is presented most clearly in *Tinker*.<sup>146</sup> We must ask ourselves how much power we want government educators to exercise over our children’s development. French philosopher Michael Foucault describes the exercise of power as “a total structure of actions brought to bear upon possible actions . . . a way of acting upon an acting subject or acting subjects by virtue of their acting or being capable of action.”<sup>147</sup> Foucault claims that a significant entanglement exists

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<sup>141</sup> *Id.* at 287.

<sup>142</sup> *Id.* at 288.

<sup>143</sup> *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991).

<sup>144</sup> In issues concerning the Establishment Clause of the First Amendment, the Supreme Court applies a reasonable observer test to decide if there is sufficient government endorsement of religion. See *Van Orden v. Perry*, 545 U.S. 677 (2005); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

<sup>145</sup> *Hazelwood*, 484 U.S. at 286 (citing *Thomas v. Collins*, 323 U.S. 516, 545 (1945)).

<sup>146</sup> See discussion *supra* Part II.A.

<sup>147</sup> Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 789 (1982).

between individual freedoms and governmental power, arguing that the two are not mutually exclusive. Essentially, he argues that the power to govern is dispersed throughout all aspects of life, directing the actions of its citizenry so as to "structure the possible field of action of others."<sup>148</sup> A "field of action" represents the thought process of the government's citizens, for the government would control the actions and ideas of its citizens through its exercise of power.

If one is to accept this skeptical but realistic view of government, concerns immediately arise about the scope of school power in restricting the expression of students. Allowing school officials to discriminate among viewpoints immediately shuts the door to discourse and reason, and in promoting such an exercise of power, the schools implicitly enforce a field of action upon their students. This field of action indirectly tells students that their controversial or topical opinions have no value within the educational system, which abridges the principles found within the majority opinion in *Tinker*.<sup>149</sup> The extent of a school's ability to direct the action of its students requires a balancing with the rights of students if a school is to be viewed as a marketplace of ideas: "If school officials enjoy carte blanche in their educational choices, then compulsory attendance, combined with students' inability to evaluate critically the school's message, creates a dangerous threat of indoctrination."<sup>150</sup>

Did the school in Christina's situation direct a field of action? One must look to the potential abuse of such a restriction, for the evils of viewpoint discrimination manifest in indirect ways. Students who share similar views with Christina, or who hold opinions that are just as controversial, will interpret the school's restriction as bias and prejudice. This governmental action sends them a message that their opinions will never be given an adequate platform in the schools. For many students, the school acts as the only medium for reasonable discourse about differing philosophies and opinions, so shutting this medium down is detrimental to certain groups of students. The school's ability to employ viewpoint discrimination chills the speech of its entire student body and directs a field of action that tells students that it is better sit down than to stand up and develop discourse within the marketplace of ideas. In essence, the school indoctrinates its students into accepting and believing the orthodoxy that topical discussions contain no value in their quest for education.

In the past, the Supreme Court has promoted the idea that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."<sup>151</sup> This philosophy cannot coexist with viewpoint discrimination. Scholars have argued, however, that the requirement of view-

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<sup>148</sup> *Id.* at 790.

<sup>149</sup> See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>150</sup> C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the Academic Marketplace*, 7 YALE L. & POL'Y REV. 343, 383 (1989).

<sup>151</sup> *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).



point neutrality would “paralyze [school administrators].”<sup>152</sup> Those in favor of viewpoint discrimination focus on the importance of the school’s ability to shape and educate the youth, arguing that a significant divide exists between First Amendment principles for adults and children. Former professor Bruce C. Hafen elaborates:

[T]he question whether authoritarian or anti-authoritarian approaches will best develop the minds and expressive powers of children is more a matter of educational philosophy and practice than of constitutional law. For that reason alone, first amendment theories applied by courts largely on the basis of anti-authoritarian assumptions are at best a clumsy and limited means of ensuring optimal educational development, whether the goal is an understanding of democratic values or a mastery of basic intellectual skills. Thus, one of *Hazelwood’s* major contributions is its reaffirmation of schools’ institutional role – and their accountability to the public for fulfilling it responsibly – in nurturing the underlying values of the First Amendment.<sup>153</sup>

Because of these concerns, a balance must be reached between the schools and the students, or between power and freedom. One must look to the “Archimedean point,” where students and educators meet to properly shape the future of the citizenry.<sup>154</sup> Archimedes employed this technique within the field of physics to separate himself from his own beliefs about science so he could achieve an objective perspective.<sup>155</sup>

The Archimedean point, an evaluative technique created by the Greek mathematician Archimedes, asks one to separate herself from the subject of inquiry to see its relation to all other things:

The pursuit of the ideal education, like the pursuit of justice, requires objectivity, reflection, detachment, and also immersion in actual experience and in the contingent world inhabited by social beings. Both educators and philosophers “need an ‘Archi-

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<sup>152</sup> Janna J. Annet, *Only the News That’s Fit to Print: The Effect of Hazelwood on the First Amendment Viewpoint-Neutrality Requirement in Public School-Sponsored Forums*, 77 WASH. L. REV. 1227, 1256 (2002).

<sup>153</sup> Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 701 (1988); see *Bd. of Educ. v. Pico*, 457 U.S. 853, 910 (1982) (Rehnquist, J., dissenting) (“In short, actions by the government as educator do not raise the same First Amendment concerns as actions by the government as sovereign.”).

<sup>154</sup> Mark G. Yudof, *Library Book Selection and the Public Schools: The Quest for the Archimedean Point*, 59 IND. L.J. 527, 527 (1984).

<sup>155</sup> HUW PRICE, *TIME’S ARROW & ARCHIMEDES’ POINT* 4 (1996) (“One of the great projects in the history of modern thought has been the attempt to achieve the untainted perspective, the Archimedean view of reality – ‘the view from nowhere . . .’”).

medean point' from which to assess the basic structure of society . . . ."<sup>156</sup>

This technique allows school officials to evaluate their actions within the complete spectrum of the educational realm and thus strip themselves of bias and authoritarian power. According to Mark G. Yudof, "The ideal education necessarily requires the location of an Archimedean point, a point positioned somewhere between critical reflection and grounding in the contingent circumstances of society."<sup>157</sup>

Of course, how educators are to reach this point cannot be easily answered, but one step towards realizing this goal would be the elimination of viewpoint discrimination. If school officials removed themselves from their positions as authority figures and objectively evaluated the abusive nature of viewpoint discrimination, they could see that enforcing viewpoint discrimination implicitly indoctrinates the students into accepting a field of action that promotes the suppression of ideas. In her book *Democratic Education*, Amy Guttmann discusses the importance of the principle of "nonrepression": "[Non-repression] secures freedom from interference only to the extent that it forbids using education to restrict *rational* deliberation or consideration of different ways of life."<sup>158</sup> Discourse exists to combat this restriction and allows students to acquire critical thinking skills necessary for life while not being indoctrinated by school officials.

School officials may counter that the suppression of certain ideas, whether vulgar or racist, is necessary in creating the proper forum for education. Therefore, without viewpoint discrimination, the school must open the door to views that promote recreational usage of drugs or white supremacy. With respect to vulgarity, school officials absolutely may step in and restrict speech that promotes sex or drugs in a disruptive manner, for no rational deliberation may develop from these views.<sup>159</sup> But this represents a content discrimination over subject matter that by its nature conflicts with a school's educational mission. The marketplace of ideas theory relates to opinions that add and do not detract from reasonable discourse of issues in society. A club that wishes to promote racism would also interfere with the school's basic educational missions, for it would potentially disrupt the safe environment that schools are required to provide.<sup>160</sup>

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<sup>156</sup> Yudof, *supra* note 1544, at 528-29 (citations omitted).

<sup>157</sup> *Id.* at 529.

<sup>158</sup> AMY GUTTMAN, *DEMOCRATIC EDUCATION* 44 (1987).

<sup>159</sup> *See, e.g.,* *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

<sup>160</sup> *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366 (10th Cir. 2000) (holding that a student's display of the confederate flag may be restricted where "officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone"). *See generally* Ellen E. Lange, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105 (1990).

At the end of the day, public schools protect children from culturally immoral views and violence, but this opens the door to attack from pro-viewpoint discrimination supporters. Shouldn't schools be allowed to discriminate among viewpoints that promote such immoral activity? No, they should not, but schools may still assert independent reasons reasonably related to legitimate pedagogical concerns that allow restrictions on speech.<sup>161</sup> The school's role as guardian passes this test and at the same time avoids any discrimination among viewpoints, for the content limitations on lewdness and the need to provide a safe environment for students naturally coincide with the school's educational mission.

But what about those parents who feel that atheism is an immoral way of life and want their children protected from any reference to its principles? The role of the educator, evaluating from the Archimedean point, must look to the totality of the situation and come to one conclusion: avoidance of controversy does not outweigh the freedom of students to debate and discuss substantive principles and ideas. The potential for abuse that comes with viewpoint discrimination is far too great of a danger, for it destroys a student's ability for intellectual development for the sake of avoiding topical issues to appease those who are not involved in the marketplace of ideas. Yudof presents this idea more eloquently:

Children must be integrated into the community but they should not be stifled. The desire to create informed citizens who understand the world in which they were born and live must be tempered by the realization that much of what society achieves depends on individuals who do not or will not conform to the prevailing wisdom. . . . Children must learn the rules of the game, but that learning must stop short of an orthodoxy that playing after dark is always forbidden.<sup>162</sup>

The orthodoxy that follows from viewpoint discrimination must be stopped now, for students who accept the suppression of their ideas are lost in totalitarianism.

## VI. CONCLUSION

Christina's name is called by the principal at the school assembly. The anxiety rabidly eats away at her stomach, for she knows that her opinions are controversial. She knows that some students will disagree with anything that comes out of her mouth because they are naturally biased against her views. She also knows, however, that others are interested in what she has to express.

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<sup>161</sup> See discussion *supra* Part II.B.

<sup>162</sup> Yudof, *supra* note 1544, at 530.

She knows that these students want to hear her side of the debate and desire an informed opinion on the matter. She knows that her speech will add to the marketplace of ideas and be treated with respect. She knows that her viewpoint will be allowed its proper expression. As her anxiety fades, Christina realizes something drastically important: the school has provided her with an opportunity to enter into the realm of discourse that normally would be rejected. As the principal calls her name, she walks to the podium and shakes his hand, acknowledging the fact that the school understands the importance of protecting her freedom of expression.

Stifling the speech of students leads to an abridgment of free thought and discourse. The direction of this field of action will keep students quiet, thus shutting down any opportunity for a sufficient marketplace of ideas. If one imagines the student standing at the schoolhouse gate where viewpoint discrimination is employed at great lengths, the student will implicitly shed her constitutional right of free speech at the door.<sup>163</sup> An illustration of the effects that this denial of speech will have on the student as an adult may be properly displayed in Franz Kafka's short work, *Before the Law*, where one stands conflicted on whether to express his voice in the shadow of the government:

Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: "If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him." These are difficulties the man from the country has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter.<sup>164</sup>

Citizens need not get permission to express their rights. If school officials wish to indoctrinate students into accepting this idea, the marketplace of ideas within society will be severely hindered for future citizens.

This freedom of expression cannot be overstated. Students are currently in danger of forfeiting these rights if schools are granted the authority to dis-

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<sup>163</sup> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas . . . ." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512 (1969) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

<sup>164</sup> Franz Kafka, *Before the Law*, in *EXISTENTIALISM* 167 (Robert C. Solomon ed., 1974).

criminate among viewpoints. This Note attempts to place the evils of viewpoint discrimination into perspective and call for its end in the public school system. *Hazelwood* should not be read to provide this broad sweep of authority, for it allows school officials to avoid an evaluation from the Archimedean point. To achieve balance, all must cooperate in preserving the freedoms of students across the country.

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